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Supreme Court, U.S.
FILED
09-183 AUG 5 - 2009
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(1)

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No.

In the Supreme Court of the United States

Dianna Joyce Roberts,

Petitioner,

v.

Bank of New York, as successor trustee under the pooling & serving agreement dated Sept. 1998, WMC Series 1998-B without recourse, their successor and assigns (sic),
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Oregon Court of Appeals affirmed without opinion the judgment of the Multnomah County Circuit Court. The questions presented are:

1. Whether the state trial court established new standards not allowed by statute or part of the subject matter in of Oregon's Forcible Entry and Detainer "FED" statute for a "purchaser" at a trustee's sale to be entitled to possession of the property on the 10th day following the sale thereby violating the United States Constitution; and whether use of arbitrarily interpreting statutes to allow a party not part of the subject matter to receive judgment, allowing a corporation lacking good standing as a corporation in Oregon to receive judgment, allowing a corporation who is not the real party in interest receive judgment, allowing a party who did not owe any interest at the time they file a FED action to receive a judgment and denying the Petitioner full opportunity to examine a witness violates Equal Protection and Due Process clauses.
2. Whether summary F.E.D. proceedings fail to provide due process where both parties claim title to the property and there is no landlord-tenant relationship between the parties.
3. Whether the findings relating to title in this F.E.D. proceeding are void for vagueness.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Dianna Roberts, Pro Se, respectfully petitions for a writ of certiorari to review the judgment entered by the Multnomah County Oregon Circuit Court on and was affirmed without opinion by Oregon Court of Appeals and Petition for Review was denied by the Oregon Supreme Court. The opinion of the trial court is part of the appendix.

OPINION BELOW

At this time no opinions have been issued by the Oregon Court of Appeals or the Oregon Supreme Court. The memorandum of the trial court for Multnomah County Circuit Court is in the form of Findings and Conclusions of Law which are unpublished (App. A). Trial court judgments was entered on May 30, 2007.

JURISDICTION

The two FED judgments of the trial court were signed by Judge Dale Koch and entered on May 30, 2007. On December 24, 2007 Petitioner filed a motion to consolidate the two case which was later granted. Oregon Court of Appeals Affirmed Without Opinion on October 15, 2008 (App. B). Petitioner filed a Motion for Reconsideration which was denied on December 3, 2008. Petitioner then filed her and Petition for Review was denied on March 4, 2009 (App. C). A timely Petition for Reconsideration was

denied on April 22, 2009. The Oregon Court of Appeals issued Appellate Judgment with an effective date of July 2, 2009 (App. D). The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The key Oregon statute involved is O.R.S. 86.755(5) and other Oregon statutes that relate to the taking of Petitioner's property. The Equal Protection Clause part of the Fourteenth Amendment to the United States provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." The Due Process comes from the above section of the Fourteenth Amendment and the Fifth Amendment which states "No person shall be ... deprived of life, liberty, or property without due process of law...."

STATEMENT

In nonjudicial foreclosure states, banks are presently doing mass-production foreclosures and evictions without ever producing the Note, or any shred of evidence of entitlement beyond the recorded documents memorializing a sale.

The issues in this case are of national importance: whether the use of the summary F.E.D. procedure in a nonjudicial foreclosure situation, where there is no landlord-tenant relationship, offends due process, especially where title is disputed and there is confusion about who owns the loan

because of securitization. This is an extremely common scenario.

Homeowners get into foreclosure in a variety of ways: some their fault, some the servicer's fault. All of these nonjudicial foreclosures share a common problem: A party claiming to be the lender can create a color of title in the county records and take possession of the property without ever producing the Note or otherwise demonstrating that it would have standing for a traditional judicial foreclosure.

ORS 86.755(5) is unconstitutional for lack of due process, to the extent that it authorizes a summary procedure in the absence of implicit acknowledgment of the plaintiff's superior title and prior possession.

The FED (forcible entry and detainer) action originally was only for defendants who had forcibly invaded or fenced in someone else's property, or for tenants who forcibly kept possession of rental property after the rental term expired. Essential elements were (1) the actual or threatened use of force, (2) prior possession by the plaintiff, and (3) either an invasion or a rental agreement. Our analysis will not consider invasion cases.

An FED is a summary proceeding in which title disputes cannot be heard. Such a procedure comports with due process only because the tenant has already acknowledged the landlord's superior title and prior possession by entering into the

landlord-tenant relationship.

In a landlord-tenant situation, the issues are simple (was there a rental agreement or not? Was the rent paid or not?) and the proof is simple (does the tenant have receipts/cancelled checks or not?) This simplicity justifies not only the restriction of issues to be heard, but also the accelerated schedule for filing pleadings in an FED case. The time to file an answer for a normal lawsuit is 30 days. ORCP 7 C(2). In the instant case, the answer was required to be filed in 7 days. Since title issues and counterclaims cannot be heard, an FED defendant is not allowed the time that would be required to prepare the pleadings for those claims. See Lindsey v. Normet, 405 U. S. 56 (1972), headnote (1)(a) (Held: ... The time for trial preparation is not unduly short where the issue is simply whether the tenant has paid or has held over...); Id. at 64-65 ("Tenants ... can be expected to know the terms of their lease, whether they have paid their rent, whether they are in possession of the premises, and whether they have received a proper notice to quit, if one is necessary.")

In recent decades, the FED has also been used by foreclosing lenders to obtain—not regain—possession of the property securing a loan. ORS 86.755(5) authorizes "the purchaser at the trustee's sale" to use the FED procedure to remove "all persons not holding under an interest prior to the trust deed."

In a nonjudicial foreclosure situation—unlike a landlord·tenant situation—the homeowner has never acknowledged the alleged purchaser's alleged title, and the alleged purchaser never had prior possession. In such circumstances, since the implicit acknowledgments are not present, a summary procedure is not warranted.

In addition, in this case the Petitioner seeks a remedy from the Oregon's trial court's arbitrary abuses concerning the interpretations and application of it's FED statutes that allowed for infringement of her property rights due process, equal protection under the law and to have a redress of grievances when a remedy has been denied. The unequal application of Oregon's FED statutes and practices by the trial court and the appellate review patently unfair process that is having an impact far beyond Oregon's borders during bad economic times and that cries out for correction by this Court.

The essential facts are not reasonably disputable. The Respondent filed two (2) FED actions against the Petitioner in which the Respondent was not the legal owner of property, was not a corporation in good standing with the State Of Oregon which by custom and practice is barred from receiving judgment and invoked a statute which the Respondent did not qualify for subject matter jurisdiction for they where not a purchaser at a trustee's sale to deny Petitioner written notice to

vacate. If Respondent truly had interest there where other remedies available to them.

A. Statutory Background

The trial court, Oregon Court of Appeals Court and the Supreme court of Oregon erred when it allowed a non "purchaser" under O.R.S. 86.755 (5) to bring suit in a FED action. That statute states:

> (5) The purchaser at the trustee's sale shall be entitled to possession of the property on the 10th day following the sale, and ...persons not holding ... interest ... may be removed from possession by following the procedures set out in O.R.S. 105.105 to 105.168 ... *provided* that ... the grantor must first receive 30 days written notice of the intent to remove that person served no earlier than 30 days before the date first set for the sale... (Emphasis added).

A judge or officer of any court can not add or take away words written in a statute pursuant to O.R.S. 174.010. When dealing with FED actions the statutes must be strictly construed and FED action is not intended as a substitute for an action in trespass or ejectment. Purcell v. Edmunds, 175 Or. 68, 70, 151 P. 2d 629 (1944); Scales v.

Spencer, 246 Or. 111, 113, 424 P. 2d 242 (1967); Teresi v. Gina Belmonte Corp., 31 Or. App.1231, 1235, 572 P. 2d 647 (1977). A FED action is a special statutory proceeding, summary in its nature; it is in derogation of the common law and must be strictly construed. Schroeder v. Woody, 166 Or 93, 96, 109 P2d 597 (1941).

B. Factual Background

The Petitioner, Dianna Joyce Roberts was left notices of eviction at her home at 17930-17932 N.E. Wasco Street, Portland Oregon on December 31, 2006. Respondent, Bank of New York, brought two FED actions, after Petitioner filed a federal action in the district court of Oregon on December 27, 2006, and then misrepresenting to the trial court they were a "purchaser" (sic) at a trustee's sale (sic) of Petitioner's property when they filed out the complaint invoking O.R.S. 86.755(5). The nature of the FED trial centered on whether another federal action that was pending could be affecting the disputed property title; was the Respondent name a legal name; did Respondent file the FED action before acquiring a disputed title in a name that is a non-entity; did Respondent misrepresent to the trial court that Petitioner has a civil action to set aside the trustee's sale; was Petitioner denied equal protection, due process and

where error's committed in admitting and accepting certain evidence and being denied to attack whether the trustee was duly appointed, pursuing a FED action without the legal authority of the owner and whether the property was even in default to cause a trustee's sale.

Petitioner has had ongoing litigation with counsel at trial court for the Respondent, her client(s) and other parties relating to her property. Petitioner filed a verified complaint in the Federal District of Oregon on April 17,2002, case number 02-CV-499BR. This complaint is filed under the Truth in Lending Act to request declaratory judgment affirming that the plaintiff validly rescinded a consumer credit transaction with the defendants using plaintiff's property for security of a loan, and to recover damages, court costs for the defendants' failure to honor the rescission notice in conformity with TILA. Petitioner also sought relief and/or damages from Defendant(s) for violations of Unlawful Trade Practices Act, misrepresentation(s), unilateral mistake, and fraudulent alteration in connection with the same consumer credit transaction. Defendants to this action included WMC Mortgage Corporation, Bank One, N.A., Fairbanks Capital Corporation now Select Portfolio Serving. Both Plaintiff and Defendants filled for their respective summary judgments. On February 4, 2004 trial court Judge

Anna J. Brown issued her Opinion and Order.

The trial court judge denied the Petitioner claim of rescission and granted her claim against Fairbanks for violations of FDCPA and denied the other claims. Bank One N.A., purported successor to The First National Bank of Chicago and which the Respondent claims to be successor trustee, lost their claim for judicial foreclosure and did not appeal. On June 15, 2005 the Petitioner filed her appeal. On November 23, 2005, the Petitioner's emergency motion for injunction pending appeal was granted. On November 2, 2006 Petitioner's case was ordered submitted without oral argument on November 18, 2006. On March 10, 2006 a unpublished Memorandum was issued in which the Petitioner lost.

Petitioner filed a petition for publication and was denied on May 16, 2006. On May 23, 2006 a joint petition for panel rehearing and petition for rehearing en banc was denied on May 24, 2006. On July 18, 2006, trial court Judge Anna J. Brown, issued an order dismissing Petitioner's rescission claim for lack of subject matter jurisdiction. On August 17, 2006 Petitioner filed her Petition for Writ of Certiorari (06-249) in the U.S. Supreme Court. Petitioner petition was denied on October 30, 2006.

After her petition being denied, the Petitioner made several of attempts to cure the

default of her property several times and then being denied to cure that default, the Petitioner on December 27, 2006 filed a federal court case (case # 06-1849-AS) with numerous causes of action[1] and then the Respondent proceeded with filing an two FED actions in Multnomah county, Oregon, case numbers 06F025062 and 06F025063 which are both on appeal to the Oregon Court of Appeals. Petitioner federal case is before 9th Circuit Court of Appeals, No.: 07-35433.

The Petitioner brought her federal action as a result of actions by the counsel for Plaintiff-Respondent and various parties who violated various statutes of the Oregon Trust Deed Act in which a purported trustee sold Petitioner's property in violation of statutes after attempts to make presentment(s) curing defaults were refused when Petitioner had the funds to clear any default or pay off in full the total due on the trust deed. Additional, counsel, Respondent and various other parties have used various fictitious corporations names at will, using various disputed power of

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[1] Petitioner filed causes of action for Civil Rights - 42 U.S.C. 1983; Fair Debt Collection, Practices Act; Breach of Contract; Quiet Title; Specific Performance; Wrongful Civil Proceedings; Negligence; Setting Aside Trustee's Sale; Slander of Title; Declaratory and Injunctive Relief.

names at will, using various disputed power of attorney[2] not complying with the state requirements in which they where purported to be executed thereby prejudicing the Petitioner in locating necessary information concerning these entities that would have allowed for perfection of service in lawsuits.

On January 5, 2007, the Petitioner amended her federal complaint as result of additional acts of various defendants. It was later stipulated between the parties that the Petitioner would again amended her federal complaint. On March 5, 2007, the Petitioner filed her 2nd Amended Complaint in federal court. On March 13, 2007, the Petitioner filed Motion for Temporary Restraining Order and Motion for Preliminary Injunction with all the supporting memorandum and affidavits in federal court. The Petitioner requested emergency motions for relief under the local rules on March 13, 2007 and a hearing was not conducted until April 18, 2007 which was after the March 9, 2007 trail court date being appealed in this matter. As a result of the March 9, 2007 trial conducted by Circuit Court Judge Ronald E. Cinniger, another party, "The Bank of New York[3]", who was not party to the

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[2] Power of Attorney: An instrument authorizing another to act as one's agent or attorney. Black's Law Dictionary, 5th Ed.

[3] The Bank of New York is a different entity than the Plaintiff.

federal action nor the Respondent in this case appeared in federal court claiming to have a purported judgment of this very case that was not yet issued in this state court case proclaiming that because of that judgment the Petitioner's federal case should be dismissed. As a result of this misrepresentation her case was dismissed and her federal court was appealed to the United States Court of Appeals for the 9th Circuit with case number 07-35433. On July 6, 2009 the Ninth Circuit Court of Appeals issued A Memorandum in which they reversed and remanded Petitioner's case to the district court.

REASONS FOR GRANTING PETITION

The Oregon trial court and the appellate court's have allowed the meaning of O.R.S. 86.755 (5) to be changed from legislative meaning that a purchaser at a trustee's sale to any party the right to file under this statute. This Court's review is warranted to allow for remedy to Petition for violations to her property and reputation and denial of due process ,equal protection application in the application of the law.

A. REVIEW IS WARRANTED BECAUSE THE QUESTIONS PRESENTED ARE OR

PUBLIC IMPORTANCE AND REVIEW BY THIS COURT IS ESSENTIAL TO THE PUBLIC THAT EQUAL PROTECTION CLAUSE APPLIES TO TAKING OF PRIVATE PROPERTY APPLIES IN FED PROCEEDINGS.

The equal protection clause is not intended to provide "equality" among individuals or classes but only "equal application" of the laws. Equal protection clause of Fourteenth Amendment speaks to state or to those acting under color of its authority. U.S. v. Guest, 86 S. Ct. 1170, 383 U.S. 745, 16, l. Ed. 2d 239 (1966). The Petitioner has been seeking remedy in the trial court in Multnomah County, Court of Appeals, Supreme Court of the State of Oregon and now before this Court. Petitioners seeks only that the plain meaning of statutes created by state legislature be applied and that practices set by the legislature, agencies and interpretations by courts be applied concerning FED actions.

The law should be equal applied to those appearing in a court under a certain subject matter and not have statute changed arbitrarily without regard for the law, facts and circumstances presented, in which it connotes a disregard of the evidence.

The Petitioner from the outset of this legal

action before this Court has raised the issue that the court lacked subject matter jurisdiction. Subject-matter jurisdiction concerns a court's competence to adjudicate a particular category of cases; a matter far weightier than venue, subject-matter jurisdiction must be considered by the court on its own motion, even if no party raises an objection. See, Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 382 (1884).

Subject matter jurisdiction exists when the constitution, the legislature or the law has directed a specific court to do something about a specific kine of dispute. Subject matter jurisdiction is the authority to deal with the general subject involved. Garner v. Alexander, 167 Or. 670, 120 P. 2d 238 (1941), cert. Den. 316 U.S. 690 (1942). It is the duty of the court on its own motion to refuse to proceed further if the complaint failed to allege facts that gave it subject matter jurisdiction. McEwen et ux v. McEwen et al, 203 Or. 460, 470, 280 P 2d. 402 (1955).

Respondent initiated two FED actions against the Petitioner in which they checked a box in the prepared FED form for other notice which they typed "As required by ORS 86.755 (5), attached." FED actions are to provide remedy for property owners and there are various statutes available depending on the facts.

The Oregon statute O.R.S. 86.755(5) states:

> The **purchaser at the trustee's sale shall be entitled to possession of the property on the 10th day following the sale,** and ...persons not holding ... interest ... may be removed from possession by following the procedures set out in O.R.S. 105.105 to 105.168 ... ***provided*** that ... the grantor **must first receive 30 days written notice of the intent to remove that person served no earlier than 30 days before the date first set for the sale**... (Emphasis added).

The Respondent was not the purchaser at a trustee's sale under ORS 86.755(5), nor a land lord or property owner at the time of filing of these complaints according to testimony and exhibits entered. The action of forcible entry and detainer is intended for the benefit of him whose possession is invaded, and without the possession of the right of possession when the action is commenced the action is commenced the action cannot be maintained. Taylor v. Scott, 10 Or. 483 (1883).

The purchaser at a trustee's sale would receive a trustee's deed which states the purchaser at the sale. See O.R.S. 86.770, 86.775 and 86.780. Only a purchaser receiving that "trustee's deed" on which it's name appears can bring suit under O.R.S. 86.775(5). The Respondent's name does not appear on the "trustee's deed" but in fact

Respondent's name appears on a warranty deed issued from the purchaser of the trustee's sale and whose name appeared on the "trustee's deed". In fact, another party had deed interest in the property at the time the Respondent filed the two FED actions. The trial court should have dismissed the FED actions when it learned the Respondent was not in possession of the right of possession.

Respondent has made allegation that they stand in the shoes of the party of the purchaser but they never introduce any evidence to support that allegation. Even if that where true, there would be no need to sale property in a warranty deed for valuable consideration before filing these two FED actions. Hearsay during the trial said that where not sure of any exact day the Respondent may have stood the purchaser shoes. The moment that the property was sold the party receiving the warranty deed lost authority to use O.R.S. 86.755(5).

The statute the Respondent cites in their complaint requires written notice be provided to 30 days before the date first set for trustee's sale and no notice was introduced as evidence.

"Equal protection of the laws" is not an abstract right, but is a command which the state must respect. Hill v. State of Tex., 62 S. Ct. 1159, 316 U.S. 400, 86 L Ed. 1559 (1942).

The Petitioner has a right to rely upon the statutes and court interpretations and when denied

by the trial court she loses her remedy as required by law. According to ORS 86.775 (5) only the purchaser First National Bank of Chicago of a trustee's sale could bring suit under said statute. The Respondent had to use other remedies other than that statute they invoked in their complaint if they were seeking possession.

Statutory construction is nothing more than judicial process of discerning and declaring intent of legislature. Fifth Ave. Corp. v. Washington County, 282 Or. 591, 581 P. 2d 50 (1978). The trial court erred in its reading of the word "purchaser" under O.R.S. 86.775 (5) would be the party who's name does not appears on the trustee's deed and allowing another party who was not a "purchaser" at a trustee's sale to invoke a FED proceeding without any authority to invoke the subject matter jurisdiction in their complaint. Additional, since Respondent is not the"purchaser", they would be required to provide notice to vacate under the FED statutes. O.R.S. 86.775(5) only allows for no notice if the trustee has provided notice 30 days prior to the first date set for the trustee's sale. Petitioner was attempting to attack the underlying actions of the trustee, as a witness on the stand, which included if this notice was ever provided and was cut off by the trial court. That notice was required by the same statute.

When dealing with FED actions the statutes must be strictly construed and FED action is not intended as a substitute for an action in trespass or ejectment. Purcell v. Edmunds, 175 Or. 68, 70, 151 P. 2d 629 (1944); Scales v. Spencer, 246 Or. 111,

113, 424 P. 2d 242 (1967); Teresi v. Gina Belmonte Corp., 31 Or. App.1231, 1235, 572 P. 2d 647 (1977). A FED action is a special statutory proceeding, summary in its nature; it is in derogation of the common law and must be strictly construed. Schroeder v. Woody, 166 Or 93, 96, 109 P2d 597 (1941). In that case, the court quotes with approval 22 Am Jur 934, Jurisdiction § 35 (1939), as follows:

> "'Since the action of forcible entry and detainer is a special statutory proceeding, summary in its nature, and in derogation of the common law, it is a rule of universal application in such actions that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding be coram non judice and void. Even if the action is tried in a court of record, the latter does not proceed therein by virtue of its power as a court of general jurisdiction, but derives its authority wholly from the statute, and in such proceeding is, therefore, to be treated as a court of special and limited jurisdiction.'"Emphasis added. See also, Fry v. D.H. Overmyer Co., Inc., 269 Or 281, 302, 525 P2d 140 (1974); Goodin v. King, 192 Kan 304, 387 P2d 206 (1963); Vogel v. Bacus, 133 Conn 95, 48 A2d 237, 169 ALR 910 (1946).

In the Petitioner's answer to Respondent's complaints other court filings and during trial she denied that the Respondent being a legal entity and

or in good standing to be a plaintiff in any legal action. For the Respondent to bring a suit it must be a legal[4] entity[5]. The act of bringing a suit must be done on behalf of its officers of said corporation. By definition, a corporation can act only through its officers and agents. Housing Authority of Portland v. Comstock, 163 Or. App. 463,988 P. 2d 407, review denied 330 Or. 71, 994 P. 2d 133 (1999).

The trial Court, Court of Appeals and Oregon Supreme court erred by allowing judgment to the Respondent when they failed to prove their corporation's existence when it was denied in Petitioner's answer or at trial. If existence can not be proven then there is no capacity to sue and a court is required to reverse a judgment once held by a plaintiff. Bunch v. Pearson, 186 Or. App. 138, 62 P3d 878 (2003); also see Goodale Lumber Co. v. Shaw, 41 Or. 544, 69 P. 546 and Multorpor Co. v. Reed, 122 Or. 605, 260 P. 203. A fictitious entity can not legal hold property, conduct business or bring suit in a court of law.

No evidence was offered by the Respondent of their existence when that existence was denied by Petitioner, in her answer to Respondent's complaint

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[4] Legal: Proper or sufficient to be recognized by the law; cognizable in the courts; not forbidden or discountenanced by law; competent or adequate to full the requirements of the law. Black's Law Dictionary 5th Ed.

[5] Entity: A real being; existence

from the Comptroller of Currency, Corporation Division for the State of Oregon and State of New York and as a result deprives the Respondent which is a fictitious corporation who does not have the capacity to own property or received title at a time it filed a FED action or to bring suit in a state court. When fictitious corporation is conducting business that entity should be disregarded. See Oregon RSA No. 6, Inc. v. Castle Rock Cellular Ltd.Partnership, 840 F. Supp. 770, affirmed 76 F. 3d 1003.

The Respondent had a burden to allege and prove facts sufficient enough to establish jurisdiction. See State ex. Rel Michelin v. Wells, 294 Or. 296, 657 P. 207 (1982). In prescribing conditions on which foreign corporations may transact business in this state, the Legislature sought to protect the public from fraud .... See Crites v. Associated Frozen Food Packers, 183 Or. 191, 191 P. 2d 650 (1948).

There is no such entity as "Bank of New York". The only bank coming close in name is "The Bank of New York" created as a state bank in New York and whose name does not appear in any deeds or court filings. For a bank to operate in Oregon they must comply with O.R.S. 713.130 and since they were purchasing property needed to comply with O.R.S. 713.300. Omitting parts of names is not excepted practice and entities can only exist through its name, trademark or a assumed business name. If the Respondent had made a mistake, omitted part of their name or made an error in

representing their name they had a duty to correct that name and to date they have chosen not to correct their complete name. All causes of action are to be brought under the Real Party in Interest pursuant to ORCP 26. Respondent, did not state in their complaint certifying that the present plaintiff is authorized to prosecute the action. See Jensen v. Alley, 128 Or. App. 673, 877 P. 2d 108. The trial court had a duty to notice any failure of jurisdiction when then name was brought to it's attention. See Lane Education Services District v. Swanson, 71 Or. App. 328, 692 P. 2d 622 (1984).

The guaranty of "equal protection of the laws" is a pledge of the protection of equal laws. Skinner v. State of Okl. ex rel. Williamson, 62 S. Ct. 1110, 316 U.S. 535, 86 L. Ed. 1655, on remand 155 P. 2d 715, 195 Okla. 106, 1945 OK 39 (1942).

The Respondent purports to be a successor trustee under a pooling and service agreement, which at all times was disputed by the Petitioner, which was not introduced into evidence, and made the claim they had authority to receive judgment pursuant to O.R.S. 713.300 (2).

The Respondent filed a document captioned Plaintiff's Response to Defendant Roberts's Motion to Stay Execution Pending Appeal & waive Understanding & Supersedeas Undertaking when explaining why they could bring action under O.R.S. 713.300(2).The Respondent omitted to state (3) of O.R.S. 713.300 when addressing the court or filing documents which stated they where certain filings that must be filed and pay a fee of $200.

No filing pursuant to O.R.S. 713.300(3) was ever made or located at the Department of Consumer and Business or introduced into evidence. The Petitioner does not dispute that a legal entity, using its correct and complete name, can acquire a trust deed by purchasing a deed. Petitioner denied, then as well as now, that the authority of the Respondent as a trustee under any pooling agreement in her Answer, Affirmative Defenses And Counterclaim dated January 8, 2007.

Petitioner does dispute that a entity acquiring a warrant deed, for valuable consideration, is not "indirectly" engaging in activities described in O.R.S. 713.300 (2) and then brings a suit after acquiring a deed is engaging in activities in subsection (6) but directly engaging in activities which would require the Respondent to comply with (3) which would require the Respondent to provide evidence they had comply with the statute. In addition, no evidence was ever introduced that Respondent was every appointed a trustee to any servicing and pooling agreement or brought said agreement. If the Respondent was truly the successor trustee to the pooling and service agreement dated September 1, 1998, WMC series 1998-B there would have been no needed to purchase the Petitioner's property for valuable consideration that was represented in trustee's deed to a warranty deed since they would have stood in their shoes if they had the authority they purport. Its really that simple.

For the Respondent to have any interest in

any property it must comply to statute of frauds. Respondent did not have any recorded interest in any property until after filing their FED actions. Statue of Frauds can be found in O.R.S. 41.580. The Respondent had no interest in writing that was every filed into the county records reflecting any interest in Petitioner's property when they filed the property.

Petitioner appealed her case based on fact she believed that there was no landlord tenant relationship between the Petitioner and Respondent and that she found herself in a FED action which she did not occupy premise(s) unlawfully. See Bunch v. Pearson, 186 Or. App. 138, 62 P3d 878 (2003). The Respondent sought restitution of the property pursuant to O.R.S. 86.755 (5). That statute only grants jurisdiction to a purchaser at a trustee's sale which the Respondent was not that purchaser was evidenced by testimony and trustee's deed in the trial court thereby depriving the court of jurisdiction. The fact that Respondent was not a purchaser under O.R.S. 86.755 (5) deprived the trial court of subject matter jurisdiction to hear Respondent complaint for an FED action. The Respondent FED complaint clearly invokes O.R.S. 86.755 (5) as its only authority for jurisdiction. If the trial court lacked subject matter jurisdiction its' judgment would be void. See Hermens v. Veal, 117 Or. App. 316, 319, 843 P. 2d 1013 (1992). It was not just the Petitioner who felt the Respondent used the wrong statute when gaining possession of the premises. See Order Remanding to Trial Court

Matter of Amount of Supersedeas Undertaking.

Respondent filed their complaint on December 29, 2006 and Respondent interest in disputed property was recorded in a Warranty Deed dated January 10, 2007. Even the trial court stated the "substantive question is: why did the trustee use the Bank of New York in filing suit when the document hadn't been filed yet?...". The court questioned the fact that Respondent had no interest when they filed their FED action but did not answer their own question during the trial or in the Findings of Fact and Conclusion of Law. When Petitioner attempt to follow up questioning concerning title the trial court denied her efforts.

Title to property can be questioned insofar as it may be incidentally involved in showing the right of possession. 36A CJS Forcible Entry and Detainer§ 6 (1961); Schroeder v. Woody, 166 Or. 93, 95, 109 P. 2d 597 (1941).

Equal Protection Clause reaches exercise of state power however manifested. Avery v. Midland County, Tex., 88 S. Ct. 114, 390 U.S. 474, 20 L. Ed 2d 45, on remand 430 S.W. 2 d 487 (1968). Whoever by virtue of public position under a state government deprives another of property, life or liberty without due process of law or denies or takes away the equal protection of the laws violates the 14th amendment. Ex parte Commonwealth of Virginia, 100 U.S. 339, 10 Otto 339, 25 L. Ed. 676 (1879). State action in violation of the 14th Amendment is equally repugnant to the constitutional commands when taken by a judicial

official in absence of statute. See Shelly v. Kraemer, 68 S. Ct. 836, 334 U.S. 1, 92 L. Ed. 1161 (1948).

B. REVIEW IS WARRANTED BECAUSE THE QUESTIONS PRESENTED ARE OR PUBLIC IMPORTANCE AND REVIEW BY THIS COURT IS ESSENTIAL TO THE PUBLIC THAT DUE PROCESS CLAUSE APPLIES TO TAKING OF PRIVATE PROPERTY APPLIES IN FED PROCEEDINGS.

Right to a fair and public trial conducted in a competent manner which includes the right to be present, to be heard in their own defense, right to confront a witness and that the laws be equally applied is what every American when he or she enters a courtroom. Due process is primary and indispensable foundation of individual freedom. Application of Gault, 87 S. Ct. 1428, 387 U.S. 1, 18 L. Ed. 2d 527 (1967).

Due process of law is the regular course of administration through the courts of justice and in each particular case means such exercise of the powers of the government as the settled maxims of law permit and sanctions, and under such safeguards for the protection of individual rights as those maxims prescribed during the course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of

private rights.

The Petitioner found herself in court with her private property at stake. Petitioner felt she had the right to attack the underlying foreclosure the Respondent's attorney who was the trustee of the deed of trust and attorney who where party to other acts that related to this case.

The purpose of the trustee's sale is to satisfied an obligation for a trust deed which is supposed to be in default. The Legislature, in enacting O.R.S. 86.735(2), prohibited a trustee from foreclosing on a property unless a default exists. Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or. App. 528, 148 P. 3d 150 (2006). The Petitioner had another action, along with other actions to set aside the trustee's sale because the Petitioner was not in default.

Efforts by the Petitioner to attack the underlying of the trustee's conduct concerning events leading to the trustee's sale and the sale it's self was cut off by the trial court. Whoever by virtue of public position under a state government deprives another of property ... due process of law, or ... takes away the equally protection of the laws violates the 14th amendment to the Constitution. Ex parte Commonwealth of Virginia, 100 U.S. 339, 10 Otto 339, 25, L. Ed.

The Petitioner was not afforded by the trial court the opportunity to question the pooling and service agreement which claims the trustee (Respondent) of that pooling and service agreement

was not allowed to bring a court action once a trustee deed went into default and could not acquire the property according to the terms of their authority

A court's subject matter jurisdiction, as opposed to its jurisdiction over the parties, is limited. The party seeking to invoke jurisdiction has the burden of alleging facts supporting jurisdiction in its initial pleading and must prove those facts at trial. Parmele v. Mathews, 233 Or. 616, 619-620, 379 P. 2d 868 (1963). If a court lacks the power to decide a given case, the parties cannot create jurisdiction by consent. Wilson v. Matthews, 291 Or. 33, 39 P 2d 393 (1981). Lack of subject matter jurisdiction is never waived and may be raised at any time, even on appeal, by a litigant or by the court. Because Oregon does not have a due process clause in its state constitution, Oregon courts "must examine the federal constitution to ascertain the limitations on exercising jurisdiction." State ex rel Jones v. Crookham, 296 Or 735, 740, 681 P. 2d 103 (1984). The due process clause of the Fourteenth Amendment operates as a limitation on certain conduct by state courts.

The requirement of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection and property. Board of Regents v.Roth,

408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 556 (1972). A person's constitutionally significant property interest is protected by the Fourteenth Amendment against governmental rather than private infringement.

However, the trial court counsel was also the trustee of a deed of trust as well as represented the Respondent prior to this case as well as counsel to other parties who claimed to trustee's. To be a trustee to a deed of trust in Oregon comes by virtue O.R.S. 86.790 which makes the trustee an actor of the state. In this case we have two state actors being the trial judge and the trustee who is also the Respondent's counsel.

The Supreme Court has extended the reach of the Fourteenth Amendment to private actors when they become so entwined with state or local government that they become, in effect, state actors. In Brentwood Academy v. Tennessee Secondary School Athletic Association, 531 U.S. 288, 121 S.Ct. 924, 148 L. Ed.2d 807 (2001), the Court held that a state athletic association was so closely connected with the public schools as to become a state actor. The association sought to curtail the alleged football recruiting abuses of Brentwood Academy, a private school with a very successful football program. Brentwood Academy sued the association and alleged that it had violated

the Fourteenth Amendment. The association was not a part of state government, but the Supreme Court held that the state had delegated authority to regulate school athletic programs to the organization. The Court applied the general principle where there is such a "close nexus between the State and the challenged action," seemingly private behavior "may be fairly treated as that of the State itself.

Whoever by virtue of public position under a state government deprives another of property, life or liberty without due process of law or denies or takes away the equal protection of the law violates the 14th Amendment to the Constitution. Ex parte Commonwealth of Virginia, 100 U.S. 339, 10 Otto 339, 25 L. Ed. 676. Private action will be considered to be "state action" for the purposes of Fourteenth Amendment if, though only if, there is such close nexus between state and challenged action that seemingly private behavior may be fairly treated as that of state itself. Brentwood Academy v. Tennessee Secondary School Athletic Ass'n., 121 S. Ct. 924, 531 U.S. 288, 148 L. Ed. 2d 807. State action in violation of the Fourteenth Amendment is equally repugnant directed by statute or taken by a judicial official in absence of statute. Shelly v. Kraemer, 68 S. Ct 836, 334 U.S. 1, 92 L. Ed. 1161.

Petitioner feels that not having a full

opportunity to question a witness deprived her right to procedural due process under the Fourteenth Amendment and the "due course of law" provision of Article I, Section 10, of Oregon Constitution. The procedural due process protection of the "due course of law" provision is essentially the same as that of the Fourteenth Amendment. Tupper v. Fairview Hospital, 276 Or. 657, 664 n. 2, 556 P. 2d 1340 (1977).

The Petitioner was attempting to locate the authority[6] behind a power of attorney, acts of the trustee and the authority before being denied. The power of attorney becomes very important because the Warranty Deed the Respondent introduced as evidence was signed in the state of Utah on January 9, 2007 and recorded 10th. This Warranty Deed was created after filing two FED actions against the Petitioner. Since this warranty deed was created, dated and signed in Utah, Utah law controls. Under the Utah Code Annotated 57-1-8, a power of attorney is a legal document which authorizes someone to execute any conveyance of real estate as an agent or attorney for the owner. In

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Authority: Permission. Right to exercise powers: to implement and enforce laws. The power delegated by principal to his agent. Black's Law Dictionary 5th Edition.

Utah, power of attorneys are valid only after they have been acknowledged, certified and recorded. Also see Dalsy Helen Kinsley v. Lewis H. Larsen, 18 Utah 2.d 170, 417 P. 2d 667 (1967).

The Petitioner was never allowed to complete her examination of the Linda Johannsen, trustee for the Respondent, which have covered this area. When an attorney in fact signs in behalf of an owner they must have a valid authority to execute the document. No power of attorney can be located for Brian Jones or Select Portfolio Serving, Inc. on behalf of the First National Bank of Chicago in the county records in Utah.

Petitioner further attempted but was denied to show prior bad act and patterns of Linda Johannsen who was the counsel for Respondent, and a disputed successor trustee in Petitioner's deed of trust, counsel for other different defendants in other court cases but was denied by trial court. Linda Johannsen, on December 12, 2002, in another court case[7] has stated that there is no such entity as "The First National Bank of Chicago" when it suited her situation but in this case counsel resurrected "The First National Bank of Chicago" to benefit her in this case. On December 18, 2006, Linda Johannsen who was counsel for the Respondent, trustee of the deed of trust, disputed successor trustee and defendant in another case

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[7] Federal court case, 02-CV-02-499-BR, filed in Oregon.

with the Petitioner created a document captioned "Trustee's Deed" in which "The First National Bank of Chicago" now acquired Petitioner's property. The problem is according to the U.S. Comptroller of the Currency office "The First National Bank of Chicago" changed it's name and became "Bank One, National Association" effective September 13, 1999. If that is not bad enough, Linda Johannsen testified several times in the trial court that it was JP Morgan and not The First National Bank of Chicago who was the purchaser at the trustee's sale. Linda Johannsen even represented to the U.S. Supreme Court in August, 2006 that 'The First National Bank of Chicago" was not a legal entity nor the trustee of the pooling and service agreement but on December 18, 2006 the witness, as trustee for the Deed of Trust, created a document captioned "Trustee's Deed" claiming the "The First National Bank of Chicago" had purchased Petitioner's property at a trustee's sale as the trustee of that pooling and serving agreement that she once had denied they where trustee. The Petitioner was never afforded the opportunity to question the witness in this area or introduce documents concerning the above allegations cut short by the trial court so Respondent counsel could go to a doctors appointment. Petitioner ask for a continuance but the trial court denied.

Additionally, the trial court denied the Petitioner's counterclaims as not being allowed. At one time, under common law, neither affirmative defenses nor counterclaims were permitted in FED

actions. Menefee Lumber Co. v. Abrams, 138 Or. 263, 270-271, 5 P. 2d 709 (1932); Arnold v. Krigbaum, 169 Cal. 143, 145, 146 P. 2d 423 (1915). This restriction has been modified by statute and some counterclaims are allowed. Attorney for Respondent stated no counterclaims allowed except by statute. Also see Answer To Defendant Robert's Counterclaim. See O.R.S. 105.132. The above statute does allow counterclaims if provided by statute. See Edward v. Fenn, 308 Or. 129, 775 P. 2d 1375 (1989); Hoffer v. Szumski, 129 Or. App. 7, 877 P. 2d 128 (1994). The trial Court stated, in error, that counterclaims are not allowed and supported that issue in Findings of Fact and Conclusions of Laws which stated in point 8 that "counterclaims" are not allowed in eviction proceedings pursuant to O.R.S. 105.132.

The Court erred because just one of the counterclaims was quiet title which is recognized by statute at O.R.S. 105.605. The action of quite title is clearly stated in the above O.R.S. statute. The Petitioner raised quite title[8] as her counterclaim. Suits to quiet title to real property in Oregon have a statutory basis since 1862. Since a suit to quiet title

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[8] Quiet title action: Removing a cloud from title by proper court action. A proceeding to establish ... title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after estopped from asserting it. Black's Law Dictionary 5th edition.

is in equity, appellate review is de novo. Rogelis v. Pettis, 49 Or. App. 537, 539, 619 P. 2d 1339 (1980), rev. denied, 290 Or. 449, (1981); Mattoon v. Clayborn, 42 Or. App. 893 895, 602 P. 2d 657 (1979).

The statute is an expansion of the common-law equitable remedy. O'Hara v.Parker, 27 Or. 156, 164, 39 P. 1004 (1985). Oregon also recognizes the common-law cause to of suit to quiet title. Hodgkin v. Boswell, 57 Or. 88, 91, 110 P. 487 (1910). The statutory purpose is:

> to provide an easy and simple method by which one having a substantial interest in real estate, but who cannot maintain an action at law against another claiming an interest adverse to him, may require said claimant to appear in a court of equity, and set up and have his claim adjudicated. Savage v. Savage, 51 Or. 167, 170, 94 P. 182 (1908).

The Petitioner was not afforded the opportunity to pursue her counterclaim or her equitable defenses during questioning. Equitable defense may be raised in FED proceeding. Rose v. Webster, 51 Or App 293, 625 P2d 1329 (1981), Port of Siuslaw v. Ram Dev., 26 Or. App. 873, 876, 544 P. 2d 631 (1976). Equitable estoppel ... is an appropriate defense in such an action (FED). Fry v. D.H. Overmyer Co., Inc. 269 Or. 281, 303-04, 525 P. 2d 140 (1974). The Petitioner raised unclean hands, statute of frauds, estoppel and discharge in her

affirmative defenses. Petitioner additional had specific performance as one of her causes of action in her federal case. The Petitioner was not allowed to pursue her affirmative defenses or counterclaims and absent evidence of forcible entry, court may not award possession pursuant to forcible entry and detainer action unless landlord-tenant relationship exists. Bunch v. Pearson, 186 Or App 138, 62 P3d 878 (2003), Sup Ct review denied; Kerr v. Jones, 193 Or App 682, 91 P3d 828 (2004).

The Court erred when denying Petitioner her due process of law in allowing her to complete her examination of a witness. Through out the trial proceedings, counsel for Respondent, put the Court and Appellant on notice that counsel had she had chemotherapy appoint at the doctors and needed to get the court proceedings over quickly so she could keep her appointment. The Petitioner asked for a continuance to allow Respondent to attend. Trial Court judge stated "...the point where I'm gonna to cut you off, and with this witness, it's coming up quite soon...". That point came just two (2) sentences later. "There are no further questions". The Petitioner objected that she was not be able to present her full case. The Petitioner still had questions of the witness: was her client the purchaser at the trustee's sale; who created the warranty deed, was their delivery of trustee's deed or warrant deed and did plaintiff execute warranty deed under a lawful agent pursuant to O.R.S. 93.020 by filing their written authority according to the law in the state in which the warrant deed was

signed and in Oregon. The Appellant had the right to pursue this line of questioning. Under O.R.S. 93.020 a deed executed by agent must be lawfully authorized by law. It was important for the Appellant to follow up this area since O.R.S. 93.480 allows a deed, done in a manner prescribed by law, to be introduced as evidence. However, the state legislature did not what all deeds excepted on face value without the ability to have them challenged. In fact they allowed to have a party subpoenaed to testify concerning the execution of a deed. See O.R.S. 93.460. The witness was purporting to be a trustee, that was in dispute; was the trustee who created the trustee's deed; was the party who created the warranty deed which was delivered to their office and not to the possession of the Respondent.As the Petitioner was attempting to question the witness, the witness was objecting that she had to leave to go to doctor's appointment, with the trial Court sustaining the objection and later with the Court stating "we have to limit amount of time".

Due process protects individuals from arbitrary deprivation of their liberty by government. See County of Sacramento v. Lewis, 523 U.S. 833 at 845-49. The Court has repeatedly "spoken of the cognizable level of executive abuse of power as that which shocks the conscience." Id. at 846. "[O]nly the most egregious official conduct can be said to be arbitrary in a constitutional sense." Id. (internal quotations and citation omitted). Such conduct can be shown by "conduct intended to

injure in some way unjustifiable by any government interest." Id at 849. County of Sacramento v. Lewis, 523 U.S. 833, 848 (1998).

Due process of law is the regular course of administration through the courts of justice and in each particular case means such exercise of the powers of the government as the settled maxims of law permit and sanctions, and under such safeguards for the protection of individual rights as those maxims prescribed during the course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the enforcement and protection of private rights. The Petitioner was not afford the opportunity to finish her examination of a witness. The requirement of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection and property. Board of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 33 L. Ed. 2d 556 (1972). A person's constitutionally significant property interest is protected by the Fourteenth Amendment against governmental rather than private infringement.

The Court erred by denying a motion for directed verdict. Generally, a motion for directed verdict is a prerequisite for a claim of error based upon failure of evidence; the court of appeals can review the ... claim of error in denying a motion for direct verdict.... Building Structures, Inc. v. Young, 131 Or. App. 88, 883 P. 2d 1308 (1994), cert. Granted, 320 Or. 587, 890 P. 2d 993 (1995).

The trustee's deed shows that the purchaser at the trustee's sale was "First National Bank of Chicago...". Since the Respondent filed the complaint which under O.R.S. 86.755(5) requiring the plaintiff to be a purchaser the trial court was in err to deny the Petitioner's motion. Respondent failed to produce evidence showing they where the purchaser and/or failed to established that their was a landlord-tenant relationship existing or that a party has taken premises unlawfully. See Bunch v. Pearson, 186 Or. App 138, 62 P. 3 878 (2003).

If the trial court judgment is allowed to stand then it would be in opposition to various statutes, court decisions and state constitution. If this judgment is allowed to stand, then people who are not a purchaser at a trustee sale can just check off the FED form the section "other" and write in ORS 86.755(5) who purchase the property at a later date in hope of depriving the other side of any notice to take possession of some property.

CONCLUSION

The issues presented herein have importance beyond this particular case and have far reaching implications for the roles of the public and the courts in ensuring lawful implementation non-judicial foreclosure statutes of the State of Oregon. By reversing it's Order of dismissal, this Court can rule on whether any non-judicial foreclosure must follow the statues set out by the state legislature. A written opinion by this Court will provide crucial guidance needed by the public, state courts and trial courts in this State during economic turmoil

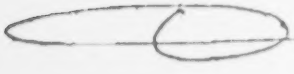
which is taking place in our economy today.

The public has a right to dispute and attack trustee's of deeds of trust who do not follow foreclosure law, procedures, practices, or foreclosure fraud where the securitized trusts in the nature of pooling and servicing are conducting non-judicial foreclosures against their very own service agreement, followed by FED actions, when they never own/hold the mortgage loan at the commencement of the non-judicial and or FED actions. The public needs to know the courts are fair, open and where the law is equally applied and not just for the rich and the powerful who can hire teams of attorneys making to the courts that are accepted once stated.

The petitioner respectfully requests this court to except her petition and grant a writ of certiorari. The Petitioner is not an attorney and is inexperienced in procedure as practiced in the U.S. Supreme Court. If this submission is found wanting in one or more particulars, it is incumbent upon the Court to inform Petitioner of the deficiencies, their specifics and assist the Petitioner in correcting the submission, and the petitioner hereby respectfully requests such assistance.

The petition for a writ of certiorari should be granted.

Respectfully submitted.



8-5-09

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